IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

---

**No. 76-1069**

---

CANADIAN NATIONAL RAILWAY COMPANY AND
CANADIAN PACIFIC LIMITED,
*Appellants,*

v.

THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION,
*Appellees.*

---

## APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

---

RICHARD J. FLYNN
LEE A. MONROE
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

*Of Counsel:* *Attorneys for Appellants*

SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

---

No. 76-1069

---

CANADIAN NATIONAL RAILWAY COMPANY AND
CANADIAN PACIFIC LIMITED,
*Appellants,*

v.

THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION,
*Appellees.*

---

## APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

---

Appellants, Canadian National Railway Company and Canadian Pacific Limited, pursuant to Rule 16(4) of this Court's Rules, submit the following as their brief in opposition to the motions to affirm filed herein:

### PRELIMINARY STATEMENT

On February 3, 1977, Appellants filed their Jurisdictional Statement, contending that the three-judge court below erred in its refusal to set aside an order of the Interstate Commerce Commission (the Commission) which Appellants contended was issued in violation of the notice and hearing requirements of law. Motions to affirm

have been filed jointly by the United States and the Interstate Commerce Commission (hereafter the United States) and by the Aluminum Company of Canada, Ltd. (Alcan), an intervening defendant in the proceedings below.

## ARGUMENT

The United States and Alcan fail to deal with the contentions advanced by Plaintiffs in their Jurisdictional Statement. They make no effort to meet Appellants' argument that the Commission may not, by virtue of the plain language of Section 15(1) of the Interstate Commerce Act, issue a "cease and desist" order, such as the challenged order, without first holding a hearing (J.S., pp. 9-11); they fail to deal with the contention, and cases in support thereof, that the challenged order was a substantive rule or modification as to which the Administrative Procedure Act requires a hearing (J.S., pp. 12-19); and they fail to reply to Appellants' contention, also supported by case law, that the challenged order had such a substantial impact upon the regulated carriers that a hearing was required as a matter of fundamental fairness (J.S., pp. 20-21).

Instead, the United States and Alcan assert, without discussion and without supporting case law, that the challenged order was merely an interpretation or clarification of the Commission's original order in the Ex Parte 267 proceeding and for that reason a hearing was not required. They contend also that even if a hearing was required, such a hearing was afforded the railroads in other proceedings.

Neither contention has any merit.



## I.

### THE CHALLENGED ORDER DID NOT INVOLVE AN INTERPRETATIVE QUESTION

In their Jurisdictional Statement (pp. 12-19), Appellants demonstrated that the challenged order did not merely interpret the Commission's original order in Ex Parte 267, but rather effected a substantive change in that order.

The only response of the United States and Alcan to that showing is the unsupported assertion that the challenged order was a mere interpretation.[1] They then argue that because it was, in their view, a mere interpretation a hearing was not required, citing *Pan American Petroleum Corp.* v. *Federal Power Commission*, 322 F.2d 999 (D.C.Cir. 1963). But, as Appellants have already shown (J.S., p. 17 n. 12), that case is not in point. In *Pan American*, the Court of Appeals was concerned with an FPC order in reopened proceedings which required gas producers to refund a portion of amounts collected by them. The producers contended on review that the order was issued without "hearing." The court rejected that contention, not because a hearing was not required,

---

[1] In its Motion, the United States asserts (p. 7) that an agency's interpretation of its own order controls unless it is plainly erroneous, citing *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410 (1945). The *Bowles* decision has been interpreted to mean that where the agency's language is not free from doubt, a court is "obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such" (*Ehlert* v. *United States*, 402 U.S. 99, 105 (1971)). In this case, the Commission's subsequent "interpretation" of "export-import" was plainly not reasonable in light of the plain definition of that term in its original report and order (J.S., pp. 13-14), and that "interpretation" was hardly consistent in light of the Commission's failure to rule at an early date, as it had opportunities to do (J.S., pp. 15-16), that all rail traffic between the United States and Canada was included within the term "export-import."

but rather because of the opportunity which the FPC did afford the producers to submit written evidence and written evidence satisfied the requirements of procedural due process (322 F.2d at 1004-1005).

In this case, no hearing of any kind preceded the issuance of the challenged order.

## II.

### A HEARING SUBSEQUENT TO THE ISSUANCE OF THE CHALLENGED ORDER AND IN A DIFFERENT PROCEEDING DOES NOT CURE THE FAILURE TO HOLD A HEARING IN THE FIRST INSTANCE; THE SUBSEQUENT HEARING WAS IN FACT NO HEARING AT ALL

The United States contends that even if a hearing were required, the railroads "views on that issue have already been forcefully presented to the Commission on two occasions" (Motion, p. 6). The United States refers (1) to the so-called *Alan Wood Steel* proceeding involving a single commodity (see J.S., p. 4 n.2), and (2) to the subsequent hearing in respect of a complaint for damages (reparations) filed by Alcan (Docket No. 35828). Alcan, in its motion, also refers to the hearing held in its subsequent complaint proceeding as serving to satisfy any hearing which might have been required for issuance of the challenged order.

*Alan Wood Steel Proceeding*—Appellants were not afforded a hearing in this proceeding for the simple reason that they never received notice of it (J.S., p. 4 n.2).

*Alcan Complaint Proceeding*—The hearing in this separate proceeding was held *subsequent* to the issuance of the challenged order. While the Canadian railroads did present evidence in that subsequent proceeding showing that U.S.-Canadian rail traffic and the rates applicable thereto have never been considered "export-import"



and that they were no so considered by the Commission in its Ex Parte 267 report, the fact is that both the Administrative Law Judge who decided the matter initially and Division 2 of the Commission which sustained him on appeal were bound by the challenged order —a prior order of the full Commission. For example, the Administrative Law Judge stated that

> ". . . that portion of the complaint which seeks affirmative relief through a 'cease and desist order' for the future has recently been decided and disposed of in Commission's Order of October 5 and served October 10, 1973 [a companion order to the challenged order], Ex Parte No. 267, *Increased Freight Rates, 1971* (*Sun Oil Company of Pennsylvania*) . . ." [2]

Similarly, in its Decision and Order served July 30, 1974, Division 2 of the Commission affirmed the Administrative Law Judge on the premise that the matter had already been decided in the *Sun Oil* phase of the Ex Parte 267 proceeding.

Thus, the subsequent hearing to which the United States and Alcan refer was in reality no hearing at all and the fact remains that Appellants have never been afforded a hearing—and certainly none prior to the issuance of the challenged order—in respect of their contention that neither the railroads nor the Commission, and particularly in its original Ex Parte 267 report, have never considered all-rail U.S.-Canadian traffic and the rates applicable thereto to be "export-import."

---

[2] Administrative Law Judge's Initial Decision served January 25, 1974, in I.C.C. Docket No. 35828, sheet 2 (Unreported).

## CONCLUSION

This Court should note jurisdiction, hold that the challenged order was not issued in accordance with law, and summarily reverse the decision below.

Respectfully submitted,

RICHARD J. FLYNN
LEE A. MONROE
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

*Attorneys for Appellants*

*Of Counsel:*

SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006